IN THE SUPREME COURT
OF FLORIDA

CASE NO.: SC00-2226

INQUIRY CONCERNING A JUDGE NO.: 00-143
RE: CYNTHIA HOLLOWAY

PETITIONER'S ANSWER BRIEF
IN RESPONSE TO ORDER TO SHOW CAUSE

On Review of
a Disciplinary Recommendation by the
Hearing Panel, Judicial Qualifications Commission

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PREFACE[1]

Judge Cynthia Holloway seeks review of the "Findings, Conclusions and Recommendations" submitted by a hearing panel of the Judicial Qualifications Commission ("JQC") on January 16, 2002, pursuant to Fla. Const. art V, section 12(f). The JQC found Judge Holloway guilty of seven counts of judicial misconduct and recommended a public reprimand and 30 days suspension from office without pay. In response to this Court's "show cause" order, Judge Holloway skews all of the facts in her own favor. Because the JQC's findings and conclusions are supported by clear and convincing evidence when the record is construed in its proper light, they should be approved. Moreover, the only thing "unprecedented" about the JQC's recommended discipline (I.B. 10) is its **leniency** in the face of the "misleading" testimony given by this Judge, which the hearing panel found was "intended to keep secret" other judicial misconduct. That leniency was accorded Judge Holloway because of mitigation evidence she presented, which the hearing panel

[1] All references are to the transcript of the hearing (T.), the trial exhibits (PX-, DX-), and Judge Holloway's Initial Brief. (I.B.).

expressly took into consideration.

STATEMENT OF THE CASE AND FACTS

Judge Holloway's statement of the case and facts is argumentative, incomplete, inaccurate and in many instances unsupported by record citations (I.B. pp. 1, n. 5, 3, 4, 5-6, 7). Accordingly, this new statement of the case and facts follows.[2] To place events detailed here in context, moreover, some background is in order.

A. BACKGROUND

P.A., a minor child, was born on August 22, 1995 to Robin Adair (mother) and Mark Johnson (father) in Los Angeles, California. (T. 99). P.A.'s parents were unmarried and, at the time of her birth, had gone their separate ways. (T. 201). Robin Adair's sister, Cindy Tigert, wanted custody of P.A. because she and her husband "really wanted another child." (PX 14, p. 27). When P.A. was only ten months old, her mother moved them to Florida, where they subsequently resided in a small house on the Tigerts' property. (T. 101; 751; PX 14, p. 29).

Cindy Tigert and Judge Cynthia Holloway have been "best friends" for over fourteen years. (PX 14, P. 18). The two of

[2] Judge Holloway's brief is replete with insults directed towards the JQC's trial counsel, investigating panel, hearing panel and the witnesses appearing against her. Suffice it to say, the Judge is unhappy with the nature and outcome of these proceedings. In this Answer Brief, we have ignored the overblown rhetoric in favor of the facts.

them share just about everything. (PX 14, pp. 103-04). Their husbands are, independently, best friends and even closer than family members. (T. 750). The Tigert and Holloway families are neighbors. (PX 14, pp. 22-30). They have a "long term, very close relationship." (T. 519). They spend most holidays and vacations together, and attend the same church. Their children also have a close relationship, and address the other couple affectionately as "Aunt" and "Uncle." (PX 14, pp. 18, 32; T. 519; 526; 750).

On September 16, 1997, Robin Adair sued Mark Johnson to obtain custody of P.A. (Findings, p. 13).[3] After she filed her custody action, Robin Adair then filed a complaint with DCF claiming that P.A. had been sexually abused. Report No. 97-094417. (PX 9; p. 3). Ms. Adair took P.A. to more than one counselor because she felt that the child was "acting out" sexually, but P.A. disclosed no information reflecting that she was sexually abused. (PX 9, p. 3). P.A. was also seen by the family physician Dr. Sokol, who found no evidence of sexual abuse. (PX 9, p. 3). Detective L. Green, a Tampa police officer with its Sex Crimes Bureau, closed the case administratively after finding no evidence of sexual abuse. (PX. 9, p. 3).

[3] On October 8, 1997, Judge Stoddard, the presiding judge approved a joint stipulation of paternity, parental responsibility, visitation and support. (T. 150-51).

On October 9, 1998, Ms. Adair made a second report of sexual abuse, claiming P.A. was being abused by her father. Report No. 98-77917. (PX 9, p. 4). This case was again referred to the Tampa Police Sex Crimes Bureau and assigned to a different officer, Detective Keene. (PX 9, p. 4). P.A. was interviewed at the Child Advocacy Center on October 21, 1998. Detective Keene also found **none** of the allegations against the father substantiated and no evidence of sexual abuse. (PX 9, p. 4; T. 319). Moreover, in her case summary, Detective Keene noted the mother's admission that she was unhappy with the outcome of the prior investigation, and had been in court for several months trying to stop the father's visitation. (PX 9, p. 4).

Thus, by the time Judge Holloway became embroiled in this contentious litigation, two separate officers with the Tampa police department had rejected Ms. Adair's claims of sexual abuse by the father towards the minor child as unfounded. (T. 319). In addition, by all accounts, the custody case was not going well for Robin Adair. (T. 128; 197; 541). In October, 1998, she turned to Judge Holloway for advice,(PX 15, ¶50 & 16, ¶50), and solicited her testimony as a character witness. (T. 128; 542; 562-64). According to Robin Adair, she chose Judge Holloway as someone who would be "substantial" because "We had many witnesses there that were very credible witnesses that just seemed to be disregarded. ..." (T. 128). According to Cindy

Tigert, Robin was worried because Mr. Johnson had "very expensive legal counsel" and wanted Judge Holloway to endorse her character. Judge Holloway agreed, as long as she was served with a subpoena. (T. 562-64).

On November 18, 1998, Judge Holloway was subpoenaed by Robin's counsel to appear before Judge Stoddard. (PX 14, pp. 37-38). Judge Holloway testified that Robin Adair was a fit mother (PX 2, p. 6) and from the witness stand urged Judge Stoddard to order a CAC interview of P.A. (PX 2, pp. 7-8). Strongly implying that P.A. was the victim of sexual abuse, she testified that:

> I have two small girls of my own now, they're eight and eleven, but I have raised two girls in my home. **[P.A.] does things to herself that I don't think are necessarily appropriate contact that my children certainly never have.** My best friend's child is a little girl and never had that contact with herself or made those comments, and I just, in seeing other cases, **small children at the age of three just don't do those things and they get them from somewhere** and I felt it was appropriate to at least have the child evaluated. (PX 2, p. 8, emphasis added).

From the father's perspective, Robin Adair failed to convince the Judge there was any evidence of sexual misconduct on October 30th, "so they dragged the judge in as a witness the 18th," and "she directly implie[d] that there might be some validity to these wild allegations." (T. 197). He was incensed

that a judge would lend the prestige of her office to the mother's cause without having met or talked to him, or knowing anything about him. (T. 198).

In June 1999, the father was in Tampa to attend a deposition in the custody action. (T. 152-53). He was staying at a hotel adjacent to Jackson's Bistro, and went to the Bistro for a quick bite. (T. 153). The father was seated at the bar, when a woman came up next to him and ordered a drink. (T. 153). After a few seconds, the father realized who the woman was and said something like "You're Judge Holloway, aren't you?" (T. 153). After answering, Judge Holloway walked away, but the father followed laying down a picture in front of the Judge and asking "Excuse me. Do you recognize this kid? This is my daughter." (T. 153-54). Judge Holloway recognized P.A. immediately and said "Hello Mark." (PX 14, p. 52). Subsequently, there was a loud acrimonious exchange between Johnson and Holloway, and members of the Tigert family. Judge Holloway and her witnesses testified that Johnson threatened to get her job, (PX 14, pp. 55-59; T. 523-24, 534, 536, 646) and was escorted out of the bar by the bartender. (PX 14, pp. 61-62). Mr. Johnson denied this, but the hearing panel resolved the issue in the Judge's favor. (Findings, p. 15).

On July 14, 1999, Judge Holloway appeared before Judge Stoddard to testify on Robin Adair's behalf pursuant to subpoena

for a second time. (PX 3). She again opined that Ms. Adair was "a great mom." She also gave evidence about the father's conduct at Jackson's Bistro, describing him as "virtually losing it ..." and "totally out of hand." (PX 3, p. 8, 17).

Judge Stoddard summarized the import of Judge Holloway's testimony, on both occasions:

> [T]he first time she testified, it had to do with the demeanor of the child in reference to allegations that the child may have been sexually abused. **And she testified that the child may have been sexually abused.** And she testified that the child had behaved peculiarly a couple of times.
>
> The second time when she testified, it had to do with an altercation or a run-in she had with Mark Johnson. And that was more in the nature of some, I guess, negative character type testimony. It's typical family law type of testimony.(T. 90, emphasis added).

At the time of the events detailed here, Judge Holloway had thus already twice given testimony favoring the mother, before a colleague, in a hotly contested, acrimonious custody battle.

B. CONTACT WITH DETECTIVE YARATCH

On February 23, 2000, a **third** criminal incident report was filed accusing the father of sexual abuse on the minor child. Case No.: 00-15754. (PX 9). This case was assigned to a third detective in Tampa's Sex Crimes Bureau, Officer John Yaratch. (T. 307-310). Contrary to suggestion, (I.B. p. 1), Judge

Holloway did not contact the detective "A **few days after** the abuse allegations were made." (I.B. p. 1, emphasis added). Judge Holloway phoned Detective Yaratch on February 24, 2000, **or the very next day**. (PX 9; T. 324; 334). Judge Holloway's cell phone records for February 24 reflect two phone calls to Officer Yaratch's direct line at 12:49 p.m. and 12:51 p.m, respectively. (T. 313-14). According to Judge Holloway, she simply called the detective to tell him that the case involved a very young child and that it needed to be investigated quickly so that memories would not go stale. (PX 14, pp. 81-83).[4] She left the detective both her office number and cell phone number, with a message to contact her with respect to Adair v. Johnson. (PX 14, p. 80; T. 315).

Officer Yaratch returned the Judge's call, because she was a judge. (T. 315; PX 14, p. 81). In his written report, he documented the fact that:

> When I spoke to the judge **she stated that she had no real interest in the case other than knowing the mother and the child.** She stated that the child had spent some nights with her at her home and she requested that I conduct an interview at the CAC as soon as possible. **She said she had no personal knowledge of the incidents nor had she witnessed any statements by the child or**

[4] In no other case had Judge Holloway ever called the lead detective to make sure he was progressing timely with his case. (PX 14, p. 23).

> **actions that caused her concern.** She related that she had been involved in a situation while at a local nightclub/restaurant which also involved the child's father Mr. Johnson. According to her Johnson approached her inside the establishment and began to berate her for her involvement in civil court. **This is the second time this Judge has involved herself in this situation.** During the investigation handled by Det. Keene, the judge's assistant had made contact with Det. Keene about the case. (PX 9, emphasis added).

Contrary to suggestion, Judge Holloway did not merely "[tell] the detective that she did not want to discuss facts of the case." (I.B. p. 2). She requested an interview of the child be conducted by the CAC center as soon as possible. (T. 316).[5] Not all children are interviewed at the CAC Center, and such interview is at the discretion of the investigator. (T. 316-17).

In response to a direct question, Judge Holloway also **denied** having any personal knowledge about the case. (T. 321-22). She **denied** having witnessed any actions by the child to cause her concern. (T. 321). This testimony is diametrically opposed to what she told Judge Stoddard as a character witness for the mother, while under oath. (PX 9). She likewise failed to disclose that the child's aunt was a close friend and that she

[5] The Child Advocacy Center ("CAC") conducts forensic interviews with children, which are videotaped for use in future proceedings. (T. 316). A CAC interview can lay the groundwork for a prosecutor's determination whether or not to proceed criminally. (T. 317-18).

had previously testified as a character witness for the mother. (T. 324). One of the Hearing Panel members adduced testimony reflecting how the Judge misled the investigating officer:

> Mr. Odom: [Y]ou said when Judge Holloway called you ... she told you that the child had stayed at her house a couple of times **but she didn't have anything to do with the case?**
>
> The Witness: That's correct.
>
> Mr. Odom: **Did you interpret that to mean that she was not involved in any way, shape or fashion with the case at all?**
>
> The Witness: **Yes.** (T. 368, emphasis added).

Judge Holloway and Detective Yaratch did **not** testify "consistently that Judge Holloway was not trying to influence the detective, and that the contact was made due to the concern for the child involved in the abuse investigation." (I.B. p. 20). Detective Yaratch deemed the call, itself, to be an improper attempt to influence him, to have "something special" done in the sense of telling him he needed to get to it. (T. 325-26).[6] He explained that a judge's status in the community

[6] Ms. Adair reached out for others to influence the custody case besides Judge Holloway. Among those was ASA Dean Tsourakis, with whom she had gone to school. Ms. Adair professed concern to Tsourakis "that the right thing wasn't going to be done." This prompted ASA Tsourakis to also contact Detective Yaratch. (T. 345, 367-368). Detective Yaratch documented this contact in his report, as well, and deemed it too "inappropriate." (T. 345).

is different, and that:

> I think the action, itself, is **an attempt to influence. Just the fact that the Judge is contacting me, I think that it is an attempt right there.** Whether it be spoken or not when a judge contacts an investigator, I think it is inappropriate and I think the intent is to say 'Hey, I am involved in this, but I am not involved in this,' but, you know – **it is kind of like saying, 'Whatever you can do, you know, get it done,' and I think that is inappropriate.** (PX 8, p. 20, emphasis added).[7]

In Count (1)(a), Judge Holloway was charged with abusing her powers as a judge and improperly using the prestige of her office in phoning Officer Yaratch on February 24, 2000, and seeking to influence his investigation in the Adair case. The hearing panel found Judge Holloway "Guilty, but only as viewed in the overall context of the case." The hearing panel reasoned that "when Judge Holloway phoned Detective Yaratch on February 24, 2000, she was in fact attempting to influence Detective Yaratch to act in a manner which would be favorable to her friend Robin Adair's side of the case." (Findings p. 20). However, it cautioned that the phone call in isolation, would not warrant discipline, but for the fact that it was part of

[7] Judge Holloway did not disclose her contact with the investigating officer to P.A.'s father. He learned about it from the detective himself. (T. 229). Judge Holloway's **own** counsel adduced further evidence that Judge Holloway had **also** phoned the medical expert, Dr. Sylvia Carra, and the assistant attorney general Leslie Hoffman. (T. 229).

other closely related charges, which follow.

C. CONTACT WITH JUDGE STODDARD

On February 26, 2000, a Saturday, Judge Stoddard was on duty hearing preliminary presentments ("PP" Court). (T. 70-71, 73). Judge Stoddard had no advance notice of the hearing or the appearance of the DCF, which stepped in and asked for the child to be sheltered with the mother or a neutral third party. (T. 73-74).

Judge Stoddard ordered P.A. placed in a shelter with one of P.A.'s teachers at school. (T. 71-72). Judge Stoddard sheltered P.A. because "[I] had decided that due to the exact nature of the acrimony between the parties, that the child couldn't stay with either parent. And I had asked them to see if they could agree to some mutual third party that could watch the child." (T. 72). Judge Stoddard placed the child with someone "both parties came up with." (T. 72).

Immediately after the shelter hearing, Robin Adair started calling everyone she knew who had the ability to return P.A., because she was looking for "somebody higher than [her] judge." (T. 115). These included her congressman and state representative. (T. 114-15; 552, 553). As Cindy Tigert told the hearing panel, Robin was using whatever influence she could find. (T. 553). Cindy Tigert and Robin Adair also went to see Judge Holloway and found her at her child's ball game. (PX 14,

p. 105; T. 108-110). On February 27, 2000, Judge Holloway left on vacation with P.A. still in shelter. (PX 14, p. 107).

Prior to the shelter hearing, Judge Stoddard had already arranged to hold an emergency hearing at the father's request. That hearing was scheduled to take place on February 28, but was adjourned because the expert witnesses (including a child psychologist) wanted more time to interview P.A. (T. 74-75). A return hearing was scheduled to be convened on March 10, 2000, "as soon as everyone had finished their particular forensic or psychological tasks...". (T. 75).

Judge Holloway returned from vacation on March 2, 2000. (PX 14, p. 107). As soon as she returned, Cindy Tigert called and told her that they couldn't get a hearing for another two weeks. (T. 560).

On March 3, 2000, Judge Holloway returned to work. (PX 14, p. 114). At 11:30 a.m., Robin Adair left Judge Holloway a message, reflecting that "Attorney for DCF is Leslie Hoffman, the emergency hearing is March 10th at 10:30 a.m." (PX 14, p. 116). Judge Holloway spoke to either Robin or Cindy Tigert who complained about the week delay and questioned why "the other side seemed to be getting a hearing date on quick notice and it was going to take them a week to get the hearing in front of Judge Stoddard." (PX 14, p. 117-18; T. 560-61). Sometime that same day, Cindy Tigert and her mother also stopped by to see

Judge Holloway in her chambers. (T. 717).

Robin Adair and Cindy Tigert both denied asking Judge Holloway to influence Judge Stoddard. (T. 131; 537-38, 546-47). However, the Hearing Panel clearly rejected that testimony as defying credulity, in light of Cindy Tigert and Robin Adair's multiple contacts with the Judge, the timing of those contacts, and testimony from **both** witnesses that Robin was looking for anyone with influence "higher" than Judge Stoddard. (T. 115; 552-53). The improbability of their claims are highlighted by the following colloquy:

> Hearing Panel Member Hon. Peggy Gehl: [D]idn't you and your sister recognize that you were placing her in jeopardy by going to her at the ball field to get advice or ask her to do – **certainly she must have felt there was a pull on her to do something. You were hysterical, you were calling everybody in the State of Florida that had superiority over Judge Stoddard.** I mean, she felt like she needed to act. And then when she did, you said, "Gee, that's not what I wanted her to do." What did you want her to do?
>
> The Witness [Robin Adair]: I just wanted information.... (T. 131, emphasis added).

Judge Holloway paid a visit to Judge Stoddard. Judge Stoddard's judicial assistant, Sharron Crosby was seated at her desk on March 3, 2000, when Judge Holloway flung open the door to Judge Stoddard's office, and immediately when through to his hearing room. (T. 56, 58). Judge Stoddard had just concluded a

hearing. (T. 59). Present in the hearing room were Judge Stoddard, his bailiff, and a law student serving as the Judge's summer intern. (T. 58-59). According to Judge Stoddard and other observers, Judge Holloway was "very angry." (T. 176). Her tone was sarcastic, angry and emotional. (T. 177). Judge Holloway demanded to know why the father could get a hearing in a day, and it took the mother a week, as well as why Judge Stoddard was leaving P.A. with her teacher. (PX 14, pp. 113-34; T. 56-58). Judge Stoddard summoned his judicial assistant, who consulted the judge's docket book and told Judge Holloway that a return hearing was scheduled for the very next week. (T. 58-59).

Judge Holloway continued to remonstrate with Judge Stoddard, regarding "How can you leave her there that long?" (T. 59). She pointed her finger at Judge Stoddard, and ordered him to "Have a hearing." (T. 60). Judge Stoddard was shocked, but didn't say much. He had a hand on each arm of his chair, and the look on his face "was like a child who had been scolded by his parent." (T. 60). As Judge Holloway turned to leave, she addressed Judge Stoddard in an aside, adding that "I'd like to know what kind of hold Ronny Russo has over you" and "something about pictures of a dog." (T. 60, 65). Attorney Ron Russo represented the father at the time. (T. 73). Judge Stoddard's judicial assistant was "shocked" because she knew what this implied. (T. 65). Judge

Stoddard was also shocked, dismayed, and "a little bit hurt" because he thought he was doing a very good job on a difficult case. (T. 79).

Judge Holloway admittedly threw a "temper tantrum" in Judge Stoddard's office. (PX 14, p. 132; T. 78). She explained her last comment by reference to a common joke that "when somebody can hold something over you and get something done, that they must have pictures with you and a dog." (PX 14, p. 145). Judge Stoddard's chambers were **not** close by – they were in a **different** building across the street. (PX 14, p. 126). Thus, Judge Holloway had **plenty** of time to cool off before she went to see Judge Stoddard.[8] At 3:40 p.m., that same day, Judge Holloway received a phone message from Robin Adair, asking her to "please call" and leaving two separate phone numbers. (PX 14, p. 125 & Ex. 4).

After Judge Holloway left, Judge Stoddard directed his judicial assistant to record what she had seen and heard. (T. 61). Judge Holloway did **not** limit herself to requesting a swift hearing for the minor child. (PX 14, pp. 131-35). Among other things, Judge Holloway told Judge Stoddard that she had

[8] Judge Holloway took a noon break after her morning calendar for a pre-scheduled weekly personal appointment. (PX 14, p. 123). That lasted approximately one hour to an hour and one half with travel time. (PX 14, pp. 123-23). The events detailed here took place during a break in her afternoon calendar. (T. 118-19, 120, 126).

personally seen the child with her mother, and observed that "Ms. Adair [was] a good mother," who was very protective of her child. (T. 62-63). When Judge Stoddard urged patience and caution, Judge Holloway told him that the mother and child involved in this case were two of the people in the world "dearest to her." (T. 78).

Judge Holloway notified her husband about her *ex parte* contact with Judge Stoddard. (T. 752). At first, her husband testified that she phoned him "immediately," "tremendously upset" with what she had done. (T. 752). On further questioning, he clarified that she only told him about her contact when he arrived home from work later on that evening. (T. 789-90). Judge Holloway also phoned Cindy Tigert to reveal her *ex parte* communication with Judge Stoddard. Judge Holloway told Tigert that she "probably said something that she shouldn't have," in that she told Judge Stoddard "I don't know what Ron Russo has on you, whether he has pictures of you and a dog." (T. 116-17; 550-51; 567). In contrast, Judge Holloway disclosed **absolutely nothing** to Mr. Johnson or his counsel, about her *ex parte* contact with the presiding judge in the case. (T. 707-08).

After Judge Holloway's visit, Judge Stoddard concluded that there was no way he could continue to handle the case of Adair v. Johnson, since Judge Holloway was a witness in the case and:

> **[S]he had just conducted a fairly lengthy conversation with me** which was public to a certain extent, there were a lot of people. You know, **I can't imagine any litigant feeling that they would get any kind of fair shake after that**. So there was no doubt that I had to get out of the case. (T. 80-81, emphasis added).

This was **not** the only problem confronting Judge Stoddard.[9] However, it tipped the balance towards his recusal. (T. 91-92). As Judge Stoddard explained, Judge Holloway's contact with him "certainly removed all doubt [because] I don't think I would have had any choice but to recuse under those circumstances." (T. 92). Judge Holloway's conduct was not, as contended, alleged to be the "sole cause" of Judge Stoddard's recusal (I.B. p. 26), but only "contribut[ing] to Judge Stoddard's recusal in the cause." (Amended Notice of Formal Charges, ¶1(c)).

In Counts 1(c) and 2(a), Judge Holloway was charged with criticizing Judge Stoddard in the presence of third persons and attempting to influence his decision in the Adair case in favor of Robin Adair. She was also charged with falsely suggesting

[9] The Tampa police department was thinking of charging Robin Adair with making a false police report. Judge Stoddard had confidential information about the investigating officer, because he was the judge on that officer's divorce as well. (T. 81, 84). Judge Stoddard testified that he was concerned about a built-in bias on the part of the investigating officer, and thought that recusal was "one of the options" open to him, but hadn't researched the point when this new issue surfaced." (T. 91).

that the father's attorney had an improper hold over Judge Stoddard and making a crude remark to the judge. According to Judge Holloway, she "has admitted since the inception of these proceedings that her contact with Judge Stoddard and statements were inappropriate." (I.B. p. 25). This is negated by the Judge's answer, in which she **denied** being upset with or critical of Judge Stoddard's decisions in the case, **denied** attempting to influence Judge Stoddard, and admitted **only** to "exercis[ing] poor judgment." (Answer pp. 8-9). Her answer to the Amended Formal Charges reiterated the same denials. (App. A, pp. 3-4). She apologized to Judge Stoddard only for her "emotional behavior." (App. A, pp. 4-5). Judge Holloway did admit improper conduct on these charges at the beginning of the hearing. (Findings, pp. 5, 6).

The Hearing Panel found Judge Holloway guilty of both charges and deemed her actions intolerable, but took her apology into consideration, as well as Judge Stoddard's opinion that she was a good judge, whom he still held in high regard. (Findings p. 21).

D. JUDGE HOLLOWAY'S MISLEADING TESTIMONY

In June 2000, Mr. Johnson ran out of money to pay his attorneys, and began representing himself in the custody case. (T. 167). Mr. Johnson scheduled Judge Holloway's deposition on

a mutually agreeable date, at the law offices of Judge Holloway's husband. (T. 170). According to Judge Holloway and her attorney husband, they had no intentions of revealing anything in deposition about her *ex parte* communications with Judge Stoddard, deeming these issues to be "embarrassing" and "harassing" to Judge Holloway. (PX 14, p. 192; T. 755-56; 786).

On July 19, 2000, Mark Johnson took Judge Holloway's deposition in the custody case. During that deposition, Judge Holloway was represented by two lawyers - her husband C. Todd Alley, and her brother, James Holloway. (T. 174). Robin Adair and her lawyer Ray Brooks were also in attendance. (T. 174). Although Judge Holloway did not disclose her contact with the investigating officer and the presiding judge to Mr. Johnson, (T. 707-08), he received this information from another source and tailored his questions accordingly. (T. 178-80; 216-18). To his inquiries regarding her contact with the investigating police officer, Judge Holloway responded:

> Q. Have you or anyone in your office ever contacted law enforcement about this case?
>
> A. Yes.
>
> ...
>
> Q. Who and when, if you can recall?
>
> ...
>
> A. I think just to determine who was going

> to investigate the most recent allegation, just to find out the name of the detective attached to the file.
>
> ...
>
> Q. Did you ever speak to the Detective?
>
> ...
>
> A. I've spoken to the detective a lot, but not necessarily about this case. **I don't recall whether I spoke to him directly or not. I don't believe I did.** (T. 177-178).

Following the deposition, Judge Holloway's judicial assistant reminded her about her phone call to Detective Yaratch. (T. 769; 801). She told her lawyer/husband about the call the next day. (T. 769; 801). That same day, Judge Holloway's husband represented Cindy Tigert and her mother in other depositions scheduled by Mr. Johnson. (T. 763). Thus, he knew exactly what these other witnesses had to say on the issues. (T. 763).

Approximately one week to ten days later, Robin Adair's counsel deposed Detective Yaratch, who was "real sure" about the contact. (T. 591). He immediately called Judge Holloway's husband to tip him off that their testimony was inconsistent. (T. 602). Robin's counsel considered Judge Holloway a "friendly witness." He made the call and indicated he would make such a call to any friendly witness if "their testimony didn't line up with another witness." (T. 602). Judge Holloway's

lawyer/husband told Robin's counsel that they were already in the process of drawing up an errata sheet to Judge Holloway's deposition. (T. 603).

On August 8, 2000, almost three weeks after her deposition, Judge Holloway's lawyer/husband sent an errata sheet to the court reporter which added that:

> This deposition was taken after I had spent three hours at the funeral of Harry Lee Coe. **Upon further reflection, I do recall a brief telephone conversation with Detective Yaratch. During this conversation, I informed Detective Yaratch that I did not want to discuss the facts of this investigation but hoped that the investigation would be handled in a timely fashion.** (T. 179, emphasis added).

According to Judge Holloway, she called her husband the afternoon after her deposition to tell him that she **had** telephoned Detective Yaratch. Mr. Alley then put an errata sheet together, which she read and signed. (PX 14, p. 195-96). The errata sheet **still** revealed nothing about the misinformation Judge Holloway gave the officer concerning her involvement in the case. (PX 14, p. 195-96).

In counts three and five, Judge Holloway was charged with giving false or misleading deposition testimony regarding her contact with Detective Yaratch, because her testimony even as corrected "was not a truthful or complete account" of her conversation with the detective. (Count 5). The hearing panel

rejected Special Counsel's argument that Judge Holloway "intentionally lied" in both her deposition and errata sheet, but found Judge Holloway's testimony was "misleading". She was found guilty of these charges as well.

During the July 19, 2000 deposition, Mr. Johnson also asked Judge Holloway specifically about any contact she had with Judge Stoddard (T. 185-86). He was hoping she would tell the truth so he could ask her why she did what she did. (T. 235). However, the questions and Judge Holloway's answers are as follows:

> Q. When did you learn that [P.A.] had been sheltered?
>
> ...
>
> A. On a Saturday morning. I don't really recall the date or the time. I was at the baseball field, I think, or softball field.
>
> ...
>
> Q. Did Cindy Tigert call you?
>
> ...
>
> A. Yes.
>
> ...
>
> Q. What was your reaction?
>
> ...
>
> A. I was shocked.
>
> ...
>
> **Q. Did you do anything in response to that development in the case?**

...

A. I don't recall being able to do anything at that point.

...

Q. **Did you contact Ralph Stoddard?**

...

A. **No**.

...

Q. **Did you telephone him, contact him in any way?**

...

A. **No**. (T. 182-86, emphasis added).

In the same errata sheet, served August 8, 2000, Judge Holloway added that "My responses to these questions relate to the Saturday of the emergency shelter hearing referenced on page 28, line 24." (T. 188). In the errata sheet she signed, Judge Holloway still disclosed **nothing** about her contact with Judge Stoddard on March 3, 2000 or her *ex parte* discussions with him in the case of Adair v. Johnson. (T. 188-189). It is this deposition testimony and errata sheet that Judge Holloway "adamantly" still contends were both "truthful and responsive to Mr. Johnson's questions." (I.B. p. 7).

In Count 4, Judge Holloway was charged with giving false or misleading testimony in deposition regarding her *ex parte*

communication with Judge Stoddard. In Count 5, Judge Holloway was charged with giving misleading testimony in her errata sheet regarding those same *ex parte* communications. The Hearing Panel declined to find that Judge Holloway "intentionally lied." However, it found Judge Holloway guilty on both charges, because her testimony was misleading even with the clarifications in her errata sheet. Moreover, it expressly rejected Judge Holloway's claim that she thought these questions were limited to Saturday, February 26. On this point the hearing panel wrote:

> It was simply unacceptable that Judge Holloway would testify that she had absolutely no contact with Judge Stoddard when everyone present in the room at her deposition knew she had in fact directly contacted Judge Stoddard on March 3, 2000, and that shortly thereafter he disqualified himself in the case. We find that the questions asked on deposition fairly called for a response admitting the contact with the Judge **and we do not accept Judge Holloway's explanation that she intended and planned to answer absolutely no deposition questions regarding her contact with Judge Stoddard because she knew this was the subject of the JQC investigation prompted by Mr. Johnson's complaints. Even when the errata sheet was filed, Judge Holloway did not admit to the contact with Judge Stoddard, but equivocated as to the meaning of her answers.** (Findings, p. 22).

The hearing panel further found Judge Holloway guilty of both charges because "the errata sheet was misleading, vague, incomplete, inaccurate, and **intended to keep secret**

inappropriate contact with Judge Stoddard." (Findings, p. 9, emphasis added).

E. CONTACT WITH JUDGE ESSRIG

Circuit Judge Katherine Essrig sets aside one day a week to hear uncontested dissolutions of marriage. She maintained two separate dockets. Parties with attorneys were told to report at 1:30 p.m. (T. 376). These were taken on a first come, first served basis based upon a sign-up sheet, filled out by the attorney. (T. 383, T. 516). The second docket was for *pro se* litigants who were told to report at 2:30 p.m. (T. 376). When attorney cases ran over, which happened frequently, *pro se* litigants would have to wait. (T. 377).

On July 29, 1999, Judge Essrig was scheduled to hear the uncontested divorces, including that of James Holloway, Judge Holloway's brother. (T. 378). At some point, James Holloway called his sister and told her he was waiting for his divorce. (T. 724). Judge Holloway went across the street to the building where Judge Essrig presided over her docket. Judge Essrig came out of her hearing room (to speak to her judicial assistant) only to find Judge Holloway. (T. 383-84).

It was very crowded that day and the waiting room was filled with people. (T. 508-09). With others in the waiting room waiting for their own divorces, Judge Holloway asked Judge

Essrig, “Katherine, can’t you get my brother’s case called up? He’s got a plane to catch and he needs to go ahead and have his case heard.” (T. 383-95). Judge Holloway paused and added that, “[B]esides, nothing’s contested. They’ve worked all the matters out so it’s going to be brief.” (T. 384). Concerned about how this would look to the people who were waiting, Judge Essrig was non-committal and told Judge Holloway that **everyone** there was present on an uncontested case. (T. 384-85). Judge Essrig agreed with the defense that such scheduling requests were “pretty common” when made by lawyers and litigants and that she usually tried to accommodate them. (T. 389-90). However, it was **not** common practice for judges to make such requests on behalf of relatives (T. 390, 394).

Judge Essrig was concerned about the perception that she would be giving preferential treatment to other judges or their relatives, even though the request was “innocuous.” (T. 394). As she explained:

> I did not think a request for a case to be called up sooner so that a party or an attorney could make an airplane was at all unreasonable. I felt uncomfortable in the presence of other lawyers and parties saying to another judge, “Sure, I’ll be glad to call your brother’s case up early.”
>
> I felt it – I felt it inappropriate for me to answer it in that regard. On the other hand, I didn’t want him to miss his flight. It wasn’t a big deal in my mind

> that we might call his case up. **But I did not want to have to say in a room full of people who were about to have their cases heard, "Of course I'll take him out of order."** (T. 393-94, emphasis added).

Judge Stoddard confirmed that he had never heard of judges asking for professional courtesies from other judges on behalf of family members. (T. 94-95). It was **not** a common practice in the circuit. (T. 95).

Judge Holloway conceded that there was no reason her brother could not have had the case moved up himself. (T. 666). She asked Judge Essrig to have his case moved up ahead of other litigants because she "didn't want him to miss his flight...". (T. 725).

In Count 7, Judge Holloway was charged with lending the prestige of her office to advance the private interest of her brother. The hearing panel believed Judge Essrig and found Judge Holloway guilty as charged. (Findings, pp. 23-24).[10]

F. THE PROPOSED DISCIPLINE

The JQC Hearing Panel found as fact that Judge Holloway: (1) had improper *ex parte* communications with Judge Stoddard; (2) improperly attempted to influence his decision in Adair v. Johnson in favor of Robin Adair; (3) falsely suggested that Judge Stoddard was on the take because a lawyer had an improper

[10] Counts 2(b) and 6 were dropped.

hold over him; (4) attempted to influence the investigating police officer to act in a manner favorable to Robin Adair; (5) gave misleading testimony about her contact with the investigating officer; (6) gave misleading testimony about her *ex parte* contact with Judge Stoddard; (7) gave misleading testimony in the errata sheet intentionally, in order to keep secret her inappropriate contact with Judge Stoddard; and (8) used the prestige of her office to advance the private interests of her brother.

In mitigation, the hearing panel took into consideration: (1) witnesses attesting to Judge Holloway's good character (Findings p. 11); (2) Judge Holloway's admission of guilt and apology to Judge Stoddard for her actions towards him (Findings p. 21); (3) Judge Stoddard's testimony that she was a "good" judge, whom he still held in high regard (Findings p. 21); and (4) Judge Holloway's reputation as an attorney and a judge, well-respected by those who know her, appear before her, and others in the community, including fellow judges. (Resp. Ex. 7).[11] The Hearing Panel recommended a public reprimand, a 30 day suspension without pay, and "reasonable costs" to be determined

[11] Illustrative is the affidavit of Angelo Ferlita, Esq. who opined that he had read the notice of formal charges and "Regardless of any admissions or proof that Judge Holloway acted or failed to as set forth ..., I truly believe she can continue to serve the public as a jurist and maintain public confidence." (Id.).

at a later date.

ARGUMENT

THERE IS COMPETENT SUBSTANTIAL EVIDENCE TO SUPPORT THE HEARING PANEL'S FINDINGS, AND, IF ANYTHING, THE HEARING PANEL'S RECOMMENDATIONS OF DISCIPLINE WERE LENIENT. (ISSUES I-V, REPHRASED).

Judge Holloway was charged with violating Canons 1, 2, 3 and 5 of the Code of Judicial Conduct. Canon 1 requires a Judge to uphold the Integrity and Independence of the Judiciary. Canon 2 requires a judge to avoid impropriety and the appearance of impropriety in all of her activities. Canon 2(B) states further that:

> A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A Judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

Canon 3(b)(7) precludes the initiation of *ex parte* communications. Canon 5 precludes extra-judicial activities which demean the judicial office.

The parties agree that the prosecution has the burden of proving the charges by "clear and convincing" evidence. They diverge on (1) whether the evidence adduced met that standard, and (2) whether the hearing panel's findings of fact and

recommended punishment are supported by facts and law. Succinctly stated, they are.

"Clear and convincing" evidence is an intermediate standard of proof, which is more than a mere preponderance and less than beyond a reasonable doubt. In re Graziano, 696 So. 2d 744 (Fla. 1997). It call for evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter at issue. See Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983). The evidence must be sufficient to convince the trier of fact without hesitancy. See In re Adoption of Baby E.A.W., 658 So. 2d 961 (Fla. 1995), cert. denied sub nom, G.W.B. v. J.S.W., 516 U.S. 1051 (Fla. 1996). However, this standard of proof may be met even though the evidence is in conflict. See Fraser v. Security & Inv. Corp., 615 So. 2d 841 (Fla. 4th DCA 1993); Slomowitz v. Walker, 429 So. 2d at 800. If the findings meet this intermediate standard, then they are of persuasive force and are given great weight by this Court. In re LaMotte, 341 So. 2d 513, 516 (Fla. 1977); In re McMillan, 797 So. 2d 560 (Fla. 2001). This is so because the Hearing Panel is in a position to evaluate the evidence first hand. In re Shea, 759 So. 2d 631 (Fla.), cert. den., 531 U.S. 826 (2000).

However, the ultimate power and responsibility in making a determination rests with this Court. Id. Under the Florida

Constitution, as amended in 1996 and approved by general election in November 1998, this Court may accept, reject, or modify the Commission's findings, conclusions and recommendations of discipline – whether downward **or upward**. Fla. Const. art. V, §12(c)(1). The Constitutional amendment also broadened the sanctions available to this Court, to include "reprimand, fine, suspension with or without pay, and lawyer discipline." Fla. Const. art V, §12(a)(1). There are not a lot of disciplinary decisions emanating from this Court since the effective date of the Constitutional Amendment. These will be addressed in subsection (B) relating to discipline.

A. THE HEARING PANEL'S FINDINGS OF FACT ARE SUPPORTED.

The evidence before the Hearing Panel clearly reflects that Robin Adair and her family were trying to swing the custody battle in favor of Adair. They turned to Holloway, a close family friend, in October 1998 only **after** (1) the Tampa police department had twice determined that Robin Adair's allegations of child abuse were unfounded, and (2) the child custody battle appeared to be going against Robin Adair.

At first, Judge Holloway only appeared in the custody proceedings to give favorable character evidence for the mother and negative character evidence against the father. Thereafter, however, Judge Holloway took a more partisan role and actually

sought to influence the outcome of the proceedings. This included an **immediate** call to the detective in the **third** sexual abuse investigation, which conveyed the fact that a judge was interested in the proceedings. A judge's intervention with investigating police officers on behalf of family or friends has long been deemed a violation of judicial canons, requiring discipline. See e.g. Matter of Filipowicz, 54 A.D. 2d 348, 388 N.Y.S.2d 920 (N.Y. App. Div. 1976) (where criminal charges were made against judge's friend, judge's private conversation with two police officers gave rise to appearance of impropriety warranting censure); Matter of Ross, 428 A. 2d 858 (Me. 1981) (phone calls to police officers ticketing children of friends, and asking for a break, in addition to other charges, required published reprimand and 90 day suspension); Matter of Crislip, 391 S.E. 2d 84 (W. Va. 1990) (magistrate's attempt to get officer issuing traffic citations to withdraw it and ultimate *ex parte* case dismissal warranted one month suspension). See generally In re Richardson, 760 So. 2d 932 (Fla. 2000) (judge who told officer he was "pro police" and had his campaign managed by county PBA president); S. Lubet, "Ex Parte Communications: An Issue of Judicial Conduct," 74 Judicature 96 (August/Sept. 1990). Moreover, Judge Holloway actively concealed her role in the proceedings from the detective, so

that he would look at her as a neutral party without any stake in its outcome. This was followed closely by Judge Holloway's partisan, *ex parte* and inappropriate contact with the presiding judge.

All litigants are entitled to nothing less than the cold neutrality of an impartial judge. State ex rel. Davis v. Parks, 141 Fla. 516, 194 So. 613, 615 (Fla. 1939). A party is prohibited from obtaining an advantage by presenting matters to a judge without notice to all other interested parties. In re Inquiry Concerning a Judge: Clayton, 504 So. 2d 394, 395 (Fla. 1987); Inquiry Concerning a Judge: Leon, 440 So. 2d 1267, 1268 (Fla. 1983). *Ex parte* communications "are insidious and bring discredit to the entire judiciary." As this Court has noted:

> Nothing is more dangerous and destructive of the impartiality of the judiciary than a one - sided communication between a judge and a single litigant. Even the most vigilant and conscientious of judges may be subtly influenced by such contacts. **No matter how pure the intent of the party who engages in such contacts, without the benefit of a reply, a judge is placed in the position of possibly receiving inaccurate information or being unduly swayed by unrebutted remarks about the other side's case. The other party should not have to bear the risk of factual oversights or inadvertent negative impressions that might easily be corrected by the chance to present counter arguments.**

Rose v. State, 601 So. 2d 1181, 1183 (Fla. 1992).

The interest of justice is simply not served when only one

side holds the keys to the courthouse. Id. at 1183. See also In re Clayton, 504 So. 2d at 395 (Canon 3 reflects the fundamental requirement that no party be allowed the advantage of presenting matters to a judge without the other side present); In re Leon, 440 So. 2d at 1268-69; In re Damron, 487 So. 2d 1, 7 (Fla. 1986),

The Adair & Tigert family knew they had a receptive audience in Judge Holloway when they were looking for someone "higher" than Judge Stoddard, to influence the proceedings. The Hearing Panel was entitled to conclude that Judge Holloway did **exactly** what her friends both wanted and expected when she went to see Judge Stoddard. The Hearing Panel expressly took into account Judge Holloway's apology and remorse directed towards Judge Stoddard. However, Judge Holloway's conduct was not merely directed towards Judge Stoddard, but Mr. Johnson, and the public as a whole.

In In re Miller, 223 Kan. 130, 572 P.2d 896, 897 (Kan. 1977) the Kansas Supreme Court rejected a judge's argument that remarks made to another judge, in private, with only court personnel present, could not diminish public confidence in the judiciary, because:

> The conduct which is important here is not the mere utterance of a few words, but the attempt of Judge Miller to influence the judicial action of Judge Meyer. Justice is everybody's business, not that of judges

> alone, and the intervention by a judge on behalf of a friend is a violation of both cited Canons, whether whispered in secret or shouted in public.

Accord McCullough v. Commission on Judicial Performance, 49 Cal. 3d 186, 776 P.2d 259 (Cal. 1989) (use of personal office to benefit a friend).

Judge Holloway clearly knew that her conduct was wrong, because she told her husband and best friend. However, she did not disclose her *ex parte* contact to the injured party – P.A.'s father. Moreover, by her testimony she actively sought to conceal such contact.

While it is difficult to glean from the Judge's brief, it appears that Judge Holloway first faults the JQC investigating panel for filing charges against her for giving false or misleading testimony in a deposition, because some 19 days after the fact, she provided an errata sheet "clarifying" her testimony. (I.B. pp. 11-22). The Judge also complains that she was not allowed to **substitute** her errata sheet answers for the answers she gave in her deposition. (I.B. p. 11). Neither position is well taken.

In this disciplinary action, the issue before the hearing panel was whether Judge Holloway's conduct in giving misleading testimony under oath in deposition and following it up with a more evasive, misleading errata sheet rendered her unfit to hold

a judgeship. In this vein, "The integrity of the judicial system, the faith and confidence of the people in the judicial process, and the faith of the people in the particular judge are all affected by the false statements of a judge." In re Leon, 440 So. 2d 1267 (Fla. 1983). Apropos Leon, use of an errata sheet, like recantation "does not remove the impression that the judge attempted to use the prestige of [her] office to influence the outcome of a case" and thereafter gave misleading testimony to mask her involvement. Id.

Neither of the cases Judge Holloway cites supports the proposition that Rule 1.330(d)(4), Fla. R. Civ. Proc. nullifies testimony given under oath, and precludes the testimony from being used if the deponent supplies an errata sheet. In Motel 6, Inc. v. Dowling, 595 So. 2d 260 (Fla. 1st DCA 1992), the issue before the District Court was whether the trial court abused its discretion in the admission into evidence of an errata sheet to a deposition filed two weeks after the deposition concluded, where the witness was unavailable at trial and could not be cross-examined on the reasons for his changes. In holding it did not, the First District concluded that the defendant had the opportunity to suppress the correction by pretrial motion, but did not avail itself of such opportunity. Thus the deposition and errata sheet **were both** admissible.

In Feltner v. Internationale Nederlander Bank, N.V., 622 So.

2d 123 (Fla. 4th DCA 1993), the petitioner was deposed and prepared an errata sheet containing 61 changes. The respondent then sought document production of communications between petitioner and his counsel relating to the errata sheet, and a deposition relating to where the changes originated. The Fourth District quashed an order requiring production of the records, reasoning that they were protected by attorney client privilege. It allowed the deposition to proceed, *sans* documents, without prejudice to the deponent's assertion of a privilege to deposition questions, as raised.

An errata sheet simply does **not** eradicate the impact of prior testimony given under oath. See e.g. Baker v. Myers Tractor Services, Inc., 765 So. 2d 149 (Fla. 1st DCA 2000) (filing of errata sheet to plaintiff's deposition in personal injury action did not cure plaintiff's materially false testimony, even if it was filed in compliance with Fla. R. Civ. Proc. 1.310(e)); see also Greenway v. Int'l Paper Co., 144 F.R.D. 322, 325 (W.D. La. 1992):

> The [federal] Rule cannot be interpreted to allow one to alter what was said under oath. If that were the case, one could merely answer the questions with no thought at all then return home and plan artful responses. Depositions differ from interrogatories in that regard. **A deposition is not a take home examination.** (emphasis added).

Accord Rios v. Welch, M.D., 856 F. Supp. 1499, 1502 (D. Kan.

1994), aff'd, 67 F. 3d 1543 (10th Cir. 1995); Coleman v. Southern Pacific Transportation Co., 997 F. Supp. 1197, 1201 (D. Ariz. 1998) (even if deposition testimony is corrected, a court need not disregard deponent's original answer); Barlow v. Essette Pendaflex Corp., 111 F.R.D. 404 (M.D. N.CA. 1986) (assessing sanctions for extensive deposition changes "effectively destroying [deponent's] deposition and sabotog[ing] the deposition process"); Thorn v. Sundstrand Aerospace Corp., 207 F. 3d 383, 389 (7th Cir. 2000) (change of substance which actually contradicts the transcript is "impermissible unless it can plausibly be represented as the correction of an error in transcription, such as dropping a 'not'."); Combs v. Rockwell International Corp., 927 F. 2d 486 (9th Cir.), cert. den., 502 U.S. 859 (1991) (36 material changes altering substance of testimony warranted dismissal of action).

Even cases which espouse a different interpretation of Federal Rule Civ. Proc. 30(e) allow original deposition answers to be used, and considered in evidence, together with the errata sheet; witnesses are simply subject to impeachment on the changes. See e.g. Innovative Marketing & Technology, LLC v. Norm Thompson Outfitters, Inc., 171 F.R.D. 203 (W.D. Tex. 1997) (rule allows correction of more than typographical errors, but witness may be impeached by changes); see also Podell v. Citicorp Diners Club, Inc., 112 F. 3d 98 (2nd Cir. 1997) (Rule

does not limit the type of changes to be made, but the original answer to the deposition questions remains part of the record, and the witness is "not entitled to have his altered answers take the place of originals").

Nondisclosure along with partial or inaccurate disclosure is considered concealment in the *voir dire* process. Roberts v. Tejada, 2002 WL 242908 (Fla. 2002). Thus, we expect absolute candor from laypeople sitting as jurors. See Loftin v. Wilson, 67 So. 2d 185 (Fla. 1953). These same obligations are likewise imposed on litigating parties and lawyers. See e.g. The Florida Bar v. Hmielewski, 702 So. 2d 218 (Fla. 1997); The Florida Bar v. Williams, 604 So. 2d 447 (Fla. 1992).

In Leo's Gulf Liquors v. Lakhani, 802 So. 2d 337, 343 (Fla. 3d DCA 2001), the Third District affirmed dismissal of a civil action for fraud upon the court, rejecting the argument that Plaintiff's corporate representatives were not untruthful in their deposition answers because "they were responding narrowly to inartfully crafted questions." As Judge Sorondo aptly observed:

> Witnesses who give sworn testimony by way of interrogatories, at depositions, pretrial hearings and trial, swear or affirm to tell the truth, **the whole truth**, and nothing but the truth. We expect and will settle for nothing less. Lawyers who advise their clients and/or witnesses to mince words, hold back on necessary clarifications, or otherwise obstruct the truth-finding

> process, do so at their own, and their client's peril. Id. at 343 (emphasis in original).

We require **more** – not less – from judges. See In re LaMotte, 341 So. 2d 513, 517 (Fla. 1977) (judges held to an even higher standard than lawyers because in the nature of things "even more rectitude and uprightness is expected of them").

A party's mental intent "is hardly ever subject to direct proof." Thus, intent must be gleaned from all of the surrounding circumstances. See Busch v. State, 466 So. 2d 1075 (Fla. 3d DCA 1984); Brewer v. State, 413 So. 2d 1217, 1219-20 (Fla. 1982), rev. denied, 426 So. 2d 25 (Fla. 1983). Even under the higher criminal burden of proof, a directed verdict of acquittal based on mental intent cannot be given where the evidence is conflicting or lends itself to differing reasonable inferences. See King v. State, 545 So. 2d 375, 378 (Fla. 4th DCA), rev. denied, 551 So. 2d 462 (Fla. 1989) citing Snipes v. State, 154 Fla. 262, 17 So. 2d 93 (1944).

In the instant case, the Hearing Panel heard a plethora of evidence reflecting Judge Holloway's intent to give misleading testimony. After her *ex parte* contact with Judge Stoddard, Judge Holloway told the father absolutely nothing about the conduct she recognized was wrong. (T. 707-08). Judge Holloway and her lawyer/husband were concerned about her upcoming

reelection and resolved she would reveal nothing about the Stoddard incident which could create a campaign issue or become fodder for investigation by the JQC. (T. 784-86). It was in this context that Judge Holloway was deposed by Mark Johnson and, under oath, twice disavowed any contact with Judge Stoddard. Her testimony could not be clearer:

Q. Did you contact Ralph Stoddard?

A. No.

Q. Did you telephone him, contact him in any way?

A. No. (T. 185-86).

Judge Holloway's errata sheet, submitted three weeks later, added **only** that she thought Johnson was talking about February 26, 2000, the date of the shelter hearing. She still disclosed nothing about her contact with the Judge on March 3, 2000. (T. 188-89).

The Hearing Panel was **not** required to credit Judge Holloway's attempt to limit answers to unlimited questions. Nor was it required to believe the testimony of those aligned with Judge Holloway that they too thought the questions were limited.[12]

[12] These so-called "independent" witnesses included the Judge's lawyer-husband, Robin Adair, on whose behalf the Judge was acting, and her counsel, who tipped the Judge's husband off to other inconsistencies in her testimony.

Contrary to suggestion (I.B. p. 22-23), there is nothing inconsistent about the hearing panel's finding that Judge Holloway sought a personal favor for her brother in the presence of other litigants. The issue before the Hearing Panel, ***inter alia,*** was Judge Holloway's imperviousness to the appearance of impropriety where her friends and family were at stake – **not** whether any other litigants actually heard a request for favorable treatment. (I.B. pp. 23-24). Nor was the Hearing Panel required to give credence to testimony from witnesses that **they** heard no request, where Judge Holloway **admitted** that it was made. The Panel, as finder of fact, was likewise entitled to believe Judge Essrig's account of the circumstances over those other witnesses.

Judge Holloway also claims error in the Hearing Panel's admission of evidence on the counts of misconduct to which she admitted and offered to stipulate. (I.B. p. 25). She cites no authority for this proposition. Nor can she. In determining whether a judge has conducted herself in a manner which erodes public confidence in the judiciary, the court **must consider the wrong or act itself**. In re LaMotte, 341 So. 2d 513, 517 (Fla. 1977). Without evidence of Judge Holloway's acts, the Hearing Panel would not be able to determine their time frame, their relationship to the other charges, the context in which they

arose, or the appropriate punishment. The hearing would be nothing more than a trial of the judge's character. There was simply no abuse of the hearing panel's discretion in rejecting the judge's stipulation.

In sum, **all** of the Hearing Panel's findings of fact were supported by the record and the applicable law. They should be affirmed.

B. IF ANYTHING, THE RECOMMENDED DISCIPLINE WAS LENIENT.

Prior to 1996, this Court was limited to imposing one of only two sanctions against a judge: (1) reprimand or (2) removal. Fla. Const. art V, §12 (Commentary). Members of the public and the Article V Task Force found this choice of sanctions inadequate, and suggested the development of intermediate remedies. Id. The Constitution was broadened, effective November 1998, to add a panoply of intermediate remedies, including fine, suspension, with or without pay, and lawyer discipline. Fla. Const. art V, §12(a)(1).

Removal is the ultimate sanction, reserved for instances where the judge's conduct is "fundamentally inconsistent with the responsibilities of judicial office." In re Graziano, 696 So. 2d at 753. Historically, judges were removed from office

for stealing,[13] persistent abuse of litigants, personnel or third parties,[14] *ex parte* communications, with concealment, under oath,[15] solicitation of judicial favor in exchange for judicial acts;[16] sexual harassment,[17] and basic dishonesty.[18] See also In re Johnson, 692 So. 2d 168 (Fla. 1997) (fraud on department of motor vehicles, even in light of extensive years of public service); In re Ford-Kaus, 730 So. 2d 269 (Fla. 1999).[19]

If the Commission believed that a judge was salvageable, even if the judge's acts were serious, it had no choice but to recommend a public reprimand. Public reprimand cases thus previously ran the gamut from instances of well motivated, minor canon violations, see In re Glickstein, 620 So. 2d 1000 (Fla. 1993) (endorsement of Judge's re-election by letter to the

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[13] In re LaMotte, 341 So. 2d at 513 (repeated use of state credit card for personal expenses, even in light of prior unblemished record); In re Garrett, 613 So. 2d 463 (Fla. 1993) (knowing and intentional act of petit theft).

[14] In re Crowell, 379 So. 2d 107 (Fla. 1979), In Re Graziano, 696 So. 2d 744 (Fla. 1997); In re Graham, 620 So. 2d 1273 (Fla. 1993).

[15] In re Leon, 440 So. 2d 1267 (Fla. 1983).

[16] In re Damron, 487 So. 2d 1 (Fla. 1986).

[17] In re McAllister, 646 So. 2d 173 (Fla. 1994).

[18] In re Berkowitz, 522 So. 2d 843 (Fla. 1988).

[19] The acts at issue in Johnson and Ford-Kaus preceded the date of the constitutional amendment, although these cases were decided afterwards.

editor) to much more egregious acts of misconduct. See In re Fowler, 602 So. 2d 510 (Fla. 1992) (conviction for furnishing false information about traffic accident to the police department). There was simply **no** middle ground.

Of the cases decided since the constitutional amendment, two have resulted in removal from office, See In re Shea, supra; In re McMillan, supra, and six have resulted in public reprimands. See In re Brown, 748 So. 2d 960 (Fla. 1999); In re Luzzo, 756 So. 2d 76 (Fla. 2000); In re Richardson, 760 So. 2d 932 (Fla. 2000), In re Newton, 758 So. 2d 107 (Fla. 2000); In re Schwartz, 755 So. 2d 110 (Fla. 2000); In re Frank, 753 So. 2d 1228 (Fla. 2000).

In one case, the Hearing Panel recommended and this Court approved an intermediate remedy coupling a public reprimand with a ten day suspension, counseling, and treatment for alcoholism. In re Wilson, 750 So. 2d 631 (Fla. 1999). However, the judge was suffering from potential addiction to alcohol, which was considered in mitigation. The same cannot be said of Judge Holloway. Moreover, the facts at issue here are far worse than Wilson. Judge Wilson was an observer to a criminal violation, failed to report it, and obstructed law enforcement. Here, Judge Holloway **initiated** improper contact with the investigating officer and presiding judge to influence the outcome of a

proceeding in favor of a friend. She misled the investigating officer about her involvement in the custody case and purported observations of the minor child's behavior. Her testimony was intentionally misleading and calculated to conceal her *ex parte* communications with the presiding judge from the other party in the case. At a minimum, a 30 day suspension was entirely appropriate and justified by her behavior.

Factually, this case most resembles In re Leon, 440 So. 2d 1267 (Fla. 1983), which resulted **in removal**. Leon engaged in improper *ex parte* communications with another judge regarding the disposition of criminal cases involving the daughter of a friend, and then falsely denied such *ex parte* communications. In the instant case, Judge Holloway sought to influence the investigating officer and the presiding judge to take action in a case which also favored a friend. She falsely accused the presiding judge of being on the take when he did not do what she wished. She then actively concealed what she had done. The distinction between this case and Leon is that Judge Holloway received no financial remuneration for her actions.

In her quest for only a public reprimand, Judge Holloway urges that her behavior was "directed at a fellow judge, a person fully capable of protecting himself...." (I.B. p. 34). She misses the import of her actions. In an adversary system,

one party has to lose. Many laypeople are skeptical about the legal system, and suspect the worst of it when they meet with failure. In fact, that was the case with Judge Holloway's friends, who were already suspicious of the "delay" in obtaining a hearing from Judge Stoddard – a delay for which the judge had a legitimate reason.

Judge Holloway's accusations, made with no basis in fact, could only fan such skepticism and suspicion. As this Court recently and aptly observed in a removal case:

> [W]hen any person, and most especially a lawyer or judge, has reason to believe that public corruption exists at any level of government, that person is obligated to disclose such information to the appropriate authority without hesitation. **However, when charges are leveled without basis in fact, enormous harm is inflicted upon our public institutions by loss of confidence among a public little equipped to sort out the valid from the invalid ....** (emphasis added).

In re McMillan, 797 So. 2d 560, 572.

A finding of intentional lying has oft-tolled the death knell of a judicial career. See Ford-Kaus, Berkowitz, Leon. The Hearing Panel clearly wished to spare the judge this fate by finding her guilty of only giving intentionally misleading testimony. However, the dictionary definition of misleading is "deceptive." American Heritage Dictionary of the English Language (4th ed. 2000). Conduct which is deceptive and calculated to keep secret other inappropriate conduct is also

antithetical to judicial office. Here, the Hearing Panel flatly rejected Judge Holloway's contention that she thought the deposition questions she was asked were limited to a particular time, and found that her errata sheet – added after plenty of time to think about and contemplate her answers – "was misleading, vague, incomplete, inaccurate and intended to keep secret inappropriate contact with Judge Stoddard." (Findings p. 9). Judge Holloway's insistence on secrecy alone reflects her knowledge that her conduct could not withstand scrutiny.

In other jurisdictions which have intermediate levels of punishment, like conduct has led – at a minimum – to terms of suspension. See e.g. In re Judicial Disciplinary Proceedings Against Carrer, 192 Wis. 2d 136, 531 N.W. 2d 62 (Wis. 1995) (fifteen days suspension for presiding over friend's case, and concealing *ex parte* communications in order for judge to publicly express his personal views on the nature of the charges). Matter of Lewis, 535 N.E.2d 127 (Ind. 1989) (four year suspension warranted for discussion of pending charges against personal friend because judge "conducted his judicial duties as a broker of favor," but no removal because of substantial mitigating factors, including judge's poor health, blindness and unemployment); In re Kroger, 167 Vt. 1, 702 A. 2d 64 (Vt. 1997) (giving false **or** deceptive statements at a public

hearing warranted public reprimand and one year suspension from office). As the Vermont Supreme Court noted, the sanctions imposed for this type of conduct, run the gamut, but "none fully explain the choice of one form of discipline over another." Id. at 72.

Judge Holloway's misleading testimony about her *ex parte* contact with Judge Stoddard cannot be justified by resort to caring "too much about the welfare of a four year old child..." (I. B. p. 39). Instead, she was clearly motivated by her re-election campaign and ensuring that P.A.'s father – rightfully concerned about her repeated intervention in the custody case – did not learn what she had done.

There are two further issues which must be addressed. According to Judge Holloway, her efforts at settlement were rebuffed by the Commission "because it was more concerned with winning than doing what was right." (I.B. pp. 35-36). That is patently false. The JQC can only "settle" cases by consensus, and even then its proposed recommendation is subject to rejection by this Court. The membership of the Commission is constitutionally mandated, including a mix of judges, selected by their peers, lawyers, selected by the Florida Bar, and governor appointees, including laypeople. No particular group holds sway, and every member holds an equal vote. Fla. Const. art. V, §12(a)(1)(a),(b), (c). Thus, there can be no

"settlement" without a consensus of JQC members. Moreover, this Court has not hesitated to reject the Commission's recommendations when it deems the punishment inadequate. Here, there were **multiple** instances of misconduct by this Judge – and there was **no** consensus in favor of the judge's recommended "settlement."

The Judge further assails the Hearing Panel's recommendation that costs be assessed against her. This Court has already considered the same type of arguments made by the Judge and limited the costs recoverable in JQC proceedings. In re Hapner, 737 So. 2d 1075 (Fla. 1999); In re Shea, supra; In re McMillan, supra. See also Fla. R. Jud. Adm. 2.140(c). The **amount** of such costs is ordinarily determined on remand to the JQC Hearing Panel, and is not presently before the Court. See McMillan, supra. The costs of the dismissed charges can be segregated from the balance and deleted in subsequent proceedings before the Hearing Panel.

The Hearing Panel strove mightily to reach some middle ground. Because of the seriousness of the Judge's offenses, it found that a public reprimand would be insufficient to repair the damage to public confidence in the judiciary. It balanced the gravity of the judge's acts with the respect of her peers Judge Holloway had earned through her years of service, and her

personal reputation. (Findings, p. 24). The sanction recommended here was remarkable **only** in its leniency.

Unlike Florida Bar proceedings, JQC proceedings make no provision for a cross appeal. In the end analysis, it is left to this Court to rely on its own experience and judgment to evaluate the misconduct and reach a decision on the proposed sanction. That sanction may consist of modification of the sanction **upwards**, as well as downwards. While Special Counsel is in the position of defending the Hearing Panel's action, such modification would be appropriate here, in light of the case law.

CONCLUSION

For all of the foregoing reasons, the Hearing Panel's findings and recommendations should be approved. However, this Court, in its discretion, is clearly free to modify any discipline imposed. That discretion includes the authority to modify disciplinary action upwards, as well as downwards, and would be entirely warranted here.

Respectfully submitted,

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